THE CLOSED MARKET, THE UNION SHOP, AND THE COMMON LAW.[1]

THE power of co-operation of man with man enables him to obtain much that would be otherwise unattainable. The constant increase of this power is essential to the continued progress of the race. At the same time it is inevitable that new forms of business co-operation should also cause the appearance of new forms of oppression in the business world. This is what is now taking place as the result of industrial changes. From the point of view of the public, we have new methods by which a trade or business may be monopolized; from that of the individual, we have new methods of unfair trade competition. A question which the layman has a right to put to the lawyer, and which the profession should ask itself, is — "How have we met the new problems of private law which the greater power of business co-operation has presented to us?" I lay emphasis in putting this question on the problems of the private law, and the way our courts are meeting them, as I do not believe that what we may call the public common law is or can be developed without the aid of legislation, so as to protect the community against many possible forms of monopoly. No one, I think, can read the large number of decisions dealing with recent trade controversies between the employer and employed, or between rival capitalists or rival workmen, without being convinced that on the whole our courts have dealt efficiently with most of the questions of private law presented to them; perhaps the most conspicuous example of this efficiency in the face of new conditions is the way in which we have applied the preventive writ of injunction to all forms of unlawful interference with a man's right to carry on his trade or business.

Recently, however, there has been a note of uncertainty in the way in which our courts have met certain new forms of trade oppression which we may call, for lack of a better name, the "refined boycott." The "boycott" first appeared as the companion

[1] Being an address delivered before the Private Law Section of the Congress of Arts and Sciences, St. Louis, September, 1904.

of the strike. The strikers, as in the leading case of Casey *v.* Cincinnati Typographical Union,[1] send notices to all those who trade with their former employer that if the recipients continue to trade with him, the writers and their associates will no longer deal with them. Injury to the employer resulting, our courts seem to have had little difficulty in declaring this form of economic pressure of the employer's customers for the purpose of compelling the employer to accede to the wishes of his former employees as a civil wrong to him.[2] What we may call the surrounding facts of most of the cases of this character does not tend to incline the court towards a lenient view of the defendants' conduct. But this crude form of "boycott" can never be more than a temporary expedient resorted to in the heat of a struggle, actually in progress between an employer and his men. The more refined "boycott" is the product of a more deliberate plan to control the conditions of a trade or business, and requires a much larger and better organized association for its effective prosecution. A good example will be found in the Rhode Island case of Macaulay Brothers *v.* Tierney.[3] The plaintiffs were master plumbers; the defendants, the officers and members of an association of master plumbers. The plaintiffs were not members of the association. The association resolved that they would not buy from any manufacturer of plumbers' supplies who sold to any master plumber not a member of the association. The object of the association was to control the conditions under which the business of master plumbers is carried on, and to that end eliminate the competition of those who were not members, — in other words, to create a "closed market." Manufacturers of plumbers' supplies who had previously sold goods to the plaintiffs, refused to continue to do so solely on account of warnings received from the officers of the association. The plaintiffs asked the court to restrain the officers of the association from sending notices to the manufacturers that they must not deal with the plaintiffs on pain of losing the custom of members of the association. The court refused any relief, not because of any special

[1] 45 Fed. Rep. 135, 1891.

[2] Barr *v.* Essex Trades Council, 53 N. J. Eq. 101, 1894; Matthews *v.* Shankland, 56 N. Y. Supp. 123, 1898; Hopkins *v.* Oxley Stave Co., 83 Fed. Rep. 912 (C. C. A.), 1897; Beck *v.* Railway Teamsters' Protective Union, 42 L. R. A. 407 (Mich.), 1898; Martin *v.* McFall, 55 Atl. Rep. 465 (N. J Eq.), 1903. Compare in accord: Moores *v.* The Bricklayers' Union, 23 Ohio Weekly Bul. 48, 1890; Temperton *v.* Russell, [1893] 1 Q. B. 715; Quinn *v.* Leathem, [1901] A. C. 485.

[3] 19 R. I. 255, 1895.

objection to the form of relief asked, but on the broad ground that the members of the association, in carrying out their resolution, were acting within their legal rights.[1]

The other examples of this character of "boycott" which have come before our courts are due to similar attempts of trade unions to confine those who work at a trade to the members of a particular union; in short, to unionize a shop. A union resolves that none of its members shall work with the members of a rival union or with non-union men. They notify their employers of their resolution. The purpose of the union is of course to have none but members of the association engaged in the trade, so that the association may control for the benefit of its members the conditions of employment. The employer has his choice of discharging his workmen not members of the particular union, or seeing all his employees, members of that union, strike. As such resolutions are not passed by unions unless they are likely to be effective, the employer often feels obliged to discharge the non-union men. These sue the members of the union causing their discharge, or ask for equitable relief, and the question of the legality of the union's acts is thus brought before the court. I have given the essential facts of the recent cases of Plant *v.* Woods, a Massa-

[1] The decision in this case largely rests on two cases, Mogul Steamship Co. *v.* McGregor, L. R. 23 Q. B. 598; [1892] A. C. 25, and Bohn M'f'g Co. *v.* Hollis, 54 Minn. 223, 1893. Neither of these cases, irrespective of the soundness of the decisions, involved the question of the legality of the use of economic pressure on third persons with the intent to prevent such persons dealing with the plaintiff. In Bowen *v.* Matheson, 96 Mass. 499, 1867, a demurrer to a declaration charging in effect that the defendants, who were traders, had maliciously conspired to boycott the plaintiff, another trader, by refusing to deal with anyone who dealt with the plaintiff, was sustained. In accord: Payne *v.* The Western & Atl. R. R. Co., 13 Lea (Tenn.) 507, 1884. Compare Heywood *v.* Tillson, 75 Me. 255, 1883. In the following cases demurrers to similar declarations have been overruled: Delz *v.* Winfree, 80 Tex. 400, 1891; Oline *v.* Van Patten, 7 Tex. Civ. App. 630, 1894; Graham *v.* St. Charles St R. R. Co., 47 La. An. 214, 1895; Webb *v.* Drake, 52 La. An. 290, 1900; Ertz *v.* Produce Exchange, 79 Minn. 140, 1900; Transportation Co. *v.* Standard Oil Co., 50 W. Va. 611, 1902 (first count). Compare International & Great Northern R. R. *v.* Greenwood, 2 Tex. Civ. App. 76, 1893. In the following cases where the facts as found showed that the purpose of the defendants was, as in Macauley *v.* Tierney, to advance their own interests at the expense of the plaintiff, the court thought the plaintiff had not a cause of action: Scottish Co-operative Soc. *v.* Glasgow Fleschers Union, 35 Sc. L. R. 545, 1898; Transportation Co. *v.* Standard Oil Co., 50 W. Va. 611, 1902 (second count). An opposite conclusion was reached in the following cases: Jackson *v.* Stanfield, 137 Ind. 592, 1893; Boutwell *v.* Marr, 71 Vt. 1, 1899. In Walsh *v.* Association of Plumbers, 71 S. W. Rep. 455 (Mo. App.), 1902, the court overruled a demurrer to a bill identical with the bill filled in Macauley *v.* Tierney. *Quaere*, whether the Missouri case was decided under a statute?

chusetts case,[1] National Protective Association *v.* Cumming, a New York case,[2] and Erdman *v.* Mitchell, a Pennsylvania case.[3] In the first and last cases the court thought that the defendants' acts amounted to a civil wrong to the plaintiffs; in the New York case an opposite conclusion was reached in an opinion written by Chief Justice Parker. In this last case, three judges dissented. These cases serve to prove the assertion just made, that our courts have met the question of private law raised by the latest form of "boycott" in an uncertain manner. When the legality of attempts to close a market by economic pressure on those who deal with rivals has been called in question, as will be perceived by referring to the cases cited in the notes, the tendency has been to regard the acts of the defendants as lawful; when the legality of similar attempts to unionize a shop has been called in question, the tendency has been to regard such attempts as illegal. In both classes of cases, however, we have conflicting decisions.

Every new legal problem of any real difficulty requires for its solution an examination of the fundamental principles underlying the class of legal questions to which the new problem belongs, and an examination of the point of view from which our law approaches such problems. Thus, when we observe a conflict in the decisions on some new legal question, it is usually because of difference of opinion, not merely in the application of well-established rules, but in regard to fundamental principles and methods of examination.

---

[1] 176 Mass. 492, 1900. The earliest case involving the question is Lucke *v.* The Clothing Cutters' Ass'n, 77 Md. 396, 1893. The decision in Plant *v.* Woods is in accord with the decision in this case.

[2] 170 N. Y. 315, 1902. Compare, in apparent accord with the opinion of the dissenting judges, Curran *v.* Galen, 152 N. Y. 33, 1897 (C employed A. B *et al.* made a contract with C, by which C agreed to employ only union men. A would not join the union. C notified B *et al.* to discharge A. The notice was effective. A sued B *et al.* and recovered). The celebrated case of Allen *v.* Flood, [1895] 2 Q. B. 21, *sub nom.* Flood *v.* Jackson, [1898] A. C. 1, is not, at least as explained by the House of Lords in Quinn *v.* Leathem, [1901] A. C. 495, in accord with National Protective Ass'n *v.* Cumming. All that Allen *v.* Flood can now be said to decide, in view of the remarks of the judges in Quinn *v.* Leathem, is, that one who states to an employer the fact that he will have a strike unless he discharges a certain employee, is not liable to the employee, who is discharged in consequence of the threatened strike. The following lower court cases in New York are in accord with National Ass'n *v.* Cumming: Davis *v.* United Portable Hoisting Engineers, 28 N. Y. App. Div. 396, *dicta* Patterson, J., p. 398; Masons and Plasterers *v.* Laborers' Union Pro. Soc., 60 N. Y. Supp. 388, 1899; Reform Club of Masons *v.* Knights of Labor, 60 N. Y. Supp. 388, 1899; Tallman *v.* Gaillard, 57 N. Y. Supp. 419, 1899. See also an earlier Indiana case, Clemmitt *v.* Watson, 14 Ind. App. 38, 1895.

[3] 207 Pa. St. 79, 1903.

The legal question presented by the attempts to unionize a trade or close a market to free competition by economic pressure on the employers or customers of rivals is no exception to this rule. The published opinions in the cases referred to show more than a difference in the application of recognized legal principles; they show two radically different methods of ascertaining whether a defendant has or has not committed a tort. Most of those who reach the conclusion that the "refined boycott" is legal, have done so because they have fixed their attention primarily on the right of the defendant, rather than on the injury to the plaintiff.[1] On the other hand, those who have come to an opposite conclusion, have done so because they have primarily regarded the injury which the defendants have inflicted on the plaintiffs.[2] Indeed, granted the existence of these two methods of approaching the question of defendants' liability, in the above cases a conflict of opinion in regard to the legality of the defendants' acts is almost inevitable. One who regards primarily the rights of the defendants is almost sure to start with the assumption that a person not under contract with another may sell or refuse to sell to him, may work or not work for him, as he pleases. After this the argument generally runs somewhat as follows: "If A *et al.* threaten B that they, A *et al.* will not work for B if B deals with C; since A *et al.* are not under any obligation to deal with B, and B is under no obligation to deal with C, A *et al.* have not threatened to do what they had no legal right to do, and they have not asked B to do what he had no right to do, and therefore C is not wrongfully injured."[3] Granted that the method of examination and the first assumption are correct, there is nothing wrong in the deduction, and the conclusion must be correct. On the other hand, those who primarily direct their attention to the injury inflicted on the plaintiff do so because they assume that if the defendants have injured the plaintiff, they are liable for the injury, unless they can show a

---

[1] See the first part of Judge Parker's opinion in National Protective Asso. *v.* Cumming, 170 N. Y. pp. 320–322; also, opinion of Mitchell, J., in Bohn M'f'g Co *v.* Hollis, 54 Minn. p. 232; opinion of Chapman, J., in Bowen *v.* Matheson, 96 Mass. p. 502; of Ingersoll, Sp. J., in Payne *v.* Railroad Co., 13 Lea (Tenn.) pp. 517–520; opinion of Dean, J., in Erdman *v.* Mitchell, 159 Pa. St. p. 428.

[2] See opinion of Williams, J., in International and Great Northern Ry. Co. *v.* Greenwood, 2 Tex., Civ. App. p. 81; of Hammond, J., in Plant *v.* Woods, 176 Mass. pp. 496, 497; of Dean, J., in Erdman *v.* Mitchell, 207 Pa. St. pp. 89, 90.

[3] Compare language of Lord James of Hereford, in Allen *v.* Flood, [1898] A. C. p. 180.

legal excuse. That the plaintiffs were injured by the defendants in all the cases mentioned is unquestioned. That the defendants had no legal excuse for that injury is self-evident, if we examine for a moment the necessary character of such an excuse. It should not be found in the interest or advancement of the defendant, or even in the advancement of third persons in whom the defendant may take a disinterested interest. The excuse should be found, if at all, in the interest of the community at large. For instance, underselling a rival trader may injure him, but the interest of the community in cheap goods is a valid excuse.[1] But in such cases as Macauley *v.* Tierney, or National Protective Association *v.* Cumming, the "refined boycott" had the monopoly in one case of a business, and in the other case of a trade, for its object; and monopoly, or the control of one man or combination of men of economic conditions in any field of industry, has always been and is still regarded by English-speaking communities as inimical to public welfare.[2]

It is submitted that the method of approaching a question of alleged tort which in these instances leads to regarding the "refined boycott" as legal is fundamentally wrong, and if it should gain any permanent foothold in our law, it would destroy any ability on the part of our courts to meet efficiently the new problems which the rapidly changing industrial conditions are crowding upon us. The attitude of mind which asks, when a plaintiff complains of injury, "Had the defendant a right to do the act which

[1] The interest of the community in the protection of the poorer classes may justify an employer refusing to continue to employ any one who deals with one who charges extortionate prices. Heywood *v.* Tillson, 75 Me. 225, 1883. It would appear that the community's interest in the promotion of sobriety would justify an employer refusing to employ anyone who dealt at a particular saloon situated near his works, and that on this ground, if not on that expressed by the court, the decision in Payne *v.* Railroad Co., 13 Lea (Tenn.) 507, 1884, n. 1, p. 448 *supra*, can be justified. Some of the facts in National Protective Asso. *v.* Cumming, 170 N. Y. 315, 323, 1902, may indicate that the plaintiffs being unskilled in their trade, the defendants, their co-employees, were justified in securing their discharge, because the public has an interest in improving the skill of a class of artisans.

[2] In Macauley *v.* Tierney the court held that the desire of the defendants to free themselves from competition was a legal excuse for the injury which they inflicted on the plaintiff, thus substituting the alleged wrongdoer's own interest for the public interest as the basis of legal excuse for an injury. See 19 R. I. 258. In Plant *v.* Woods, 176 Mass. p. 505, Holmes, C. J., dissented because he thought the desire of the defendants to strengthen their organization, so that they could make a "better fight" in the future on the question of wages, a justification for the injury inflicted on the plaintiffs.

caused the injury?" must be consciously or unconsciously based on the assumption that there are some acts which man has an inherent right to do, irrespective of the circumstances under which he does them. Once admit this proposition, and someone will sooner or later perform the act which it is declared he has a legal right to do under all circumstances, under circumstances in which harm to others results, without any corresponding benefit to the community. The act of selling one's labor or one's goods is an act which in the past has usually gone unquestioned, because it was never performed under circumstances which shocked the moral sense of the community. The idea that there is an inherent right to buy or sell, to work or not to work, as one pleases, was the natural result. But the act of selling one's labor or one's goods does not differ essentially from any other act. There is no less and no more inherent right to sell labor or goods than to chop a tree. The legality of the act of tree-chopping depends on the surrounding circumstances; so with the sale. The law of torts in the past has not sprung, and could not spring, from an examination of the rights of those who injured others.

The assumption of those judges who hold the defendants' acts in the cases referred to *prima facie* illegal, because those acts have injured the plaintiff, would appear to be necessary to any advancement of our law. A state cannot recognize the existence in the individual of an inherent right to injure his fellow-man. It is only in the general recognition by our courts, of the principle that a man is *prima facie* liable for any injury to others caused by him, that we can hope to continue to meet new forms of private injury as they arise. It is inevitable that from time to time acts which heretofore have been performed under circumstances which either did not injure others or for which the actors had a valid excuse, come to be performed under circumstances which either produce injury or deprive the usual excuse of its validity. When this occurs, courts are confronted with a new question in the law of torts. This is what is now occurring in the industrial world. In the past the act of buying and selling has either been without resulting injury to anyone, or if injury has resulted, as in the case where sharp competition has driven one of the competitors to the wall, the interest of the community in procuring cheaper goods has formed a sufficient legal excuse for the injury. To-day, however, owing to the greater power of combination, the act of granting or withholding one's goods or labor can be made under circumstances

which produce injury to others, and deprive the actors of any legal excuse for that injury. The worst modern examples of this are the attempts, of which the acts of the defendants in the cases discussed are instances, of associations of capitalists and of associations of laborers to close the market to outsiders or the shop to the non-union man or member of a rival union. In all of them the act of the defendants in granting or withholding their goods or labor was an act oppressive to those who would deal with the plaintiff. Its intent was to drive the plaintiff out of the trade or business which the defendants desired to monopolize for themselves. However words sounding of "inherent rights" may momentarily cloud the issue, in the long run I believe our courts will, without exception, declare this form of "boycott" illegal, and, as in Pennsylvania and Massachusetts, hold those who institute it liable for the injury they inflict upon others. To right the wrong inflicted on particular individuals, legislation is not needed. What is needed is to get rid of the notion that there are some acts, such as buying and selling, which a man has an inherent right to do under all circumstances, and hold to the fundamental position of our common law — that he who injures his fellow-man is liable for that injury, unless he can show that the community regards his act as conducive to the public welfare.

Wm. Draper Lewis.

UNIVERSITY OF PENNSYLVANIA.